Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

SALVATORE DEMARCO,

Petitioner,

v.

UNIVERSITY OF NORTH CAROLINA, through its Board of Governors, EAST CAROLINA UNIVERSITY; the East Carolina University Department of Communications Science and Disorders, RICHARD EAKIN, Chancellor; JAMES HALLOCK, Vice Chancellor; MICHAEL RASTATTER, Department Chair,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May a Federal court apply *res judicata* to foreclose a claim of disability discrimination in employment under the Americans with Disabilities Act, concluding the claim was decided in prior State proceedings, where the State proceedings merely involved judicial review of an administrative hearing regarding termination of a university faculty member for other reasons, in which plaintiff raised discrimination contentions among other arguments, where the university disputed that plaintiff had a disability, and where no discrimination disability claim was or could have been presented or decided at State administrative or judicial levels?

PARTIES TO THE PROCEEDING

Including parties named in the caption of this Petition, the parties are:

Petitioner: Salvatore DeMarco

Respondents: University of North Carolina

University of North Carolina
Board of Governors

East Carolina University

East Carolina University
Department of Communications
Science and Disorders

Richard R. Eakin, Chancellor,
East Carolina University

James Hallock, Vice Chancellor,
East Carolina University

Michael Rastatter, Department
Chair, Department of Communications
Science and Disorders

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OPINIONS BELOW

A decision of the faculty Due Process Committee (Committee) of East Carolina University (ECU) was issued on March 6, 1998. The Committee determined that the accusations of faculty misconduct made against Petitioner were unfounded and did not warrant termination. This decision was by way of a Report to the ECU Chancellor, Richard R. Eakin. [*Appendix I*, at 29a, Lodging, L27].

On April 15, 1988, Chancellor Eakin rejected the recommendation of the Due Process Committee and discharged Petitioner. Petitioner sought review by the ECU Board of Trustees. [*Appendix H*, at 28a, Lodging, L2].

The Board of Trustees issued a letter opinion on May 18, 1998, declining to overturn that decision.

Further review was sought before the University of North Carolina Board of Governors. That Board declined jurisdiction on September 11, 1998. This left undisturbed the Chancellor's decision to discharge Petitioner. [*Appendix G*, at 27a, Lodging, L1].

Petitioner filed a petition for review in the Superior Court in Wake County, North Carolina. On December 29, 1999, that Court (Stephens, J.) dismissed the action with prejudice. [*Appendix F*, 23a-26a]. Petitioner appealed to the North Carolina Court of Appeals. On May 1, 2001, that Court affirmed. [*Appendix B*, 4a-12a].

On May 5, 1999, Petitioner filed an action in the United States District Court for the Eastern District of North Carolina (New Bern). This action, for the first time, presented a discrimination claim under the Americans with Disabilities Act (ADA), including other claims, and sought relief.

On February 25, 2000, that Court (Howard, J.) granted Respondents' motion to dismiss. [*Appendix E*, 17a-22a]. The decision was grounded on the conclusion that *res judicata* prevented the District Court from considering Petitioner's disability discrimination and other claims because, as the District Court found, Petitioner's disability claims had been decided in the State proceedings.

On March 2, 2000, the District Court suspended its Order to permit time to consider a responsive pleading by Petitioner. On October 11, 2000, having reviewed that material, the Court confirmed its original decision. [*Appendix C* and *Appendix D*, 13a-16a].

Petitioner filed a timely appeal on October 18, 2000 to the United States Court of Appeals for the Fourth Circuit. On October 19, 2001, the Fourth Circuit issued a short opinion affirming the District Court (unreported). [*Appendix A*, 1a-3a].

GROUNDS FOR JURISDICTION

Jurisdiction of the District Court was invoked through Federal question jurisdiction under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101, *et seq*. Jurisdiction thus was invoked under 28 U.S.C. § 1331 and 1337, 42 U.S.C. § 12117(a), and 42 U.S.C. § 1983.

Subject matter jurisdiction for the United States Court of Appeals for the Fourth Circuit was invoked also through the ADA and under 28 U.S.C. § 1291. The decision of the Fourth Circuit was issued October 19, 2001. No timely petition for rehearing was filed.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This Petition is filed within 90 days of the date of the decision of the Fourth Circuit. S. Ct. Rule 13.

STATUTES OR PROVISIONS INVOLVED

42 U.S.C. § 12101, *et seq.*
28 U.S.C. § 1738

STATEMENT OF THE CASE

A. General Background and Administrative Proceedings

Salvatore DeMarco ("Dr. DeMarco" or "Petitioner") was a tenured professor with a Ph.D. degree at East Carolina State University (ECU) in the Department of Communications Sciences and Disorders. (Respondents will be referred to collectively as "ECU"). Dr. DeMarco was a well respected faculty member. He began in 1981 as an Assistant Professor and in 1990 was tenured and promoted to Associate Professor. His evaluations and interactions with his colleagues were always positive. Petitioner was diagnosed with multiple sclerosis in September, 1995. This condition often causes him fatigue. The fact that Dr. DeMarco has MS was known to most of his Department colleagues by mid-1996. The University had been given written notice of his MS in March of 1996. Dr. DeMarco further contends that this also was known to ECU Chancellor Richard R. Eakin.

Certain incidents relating to faculty conduct occurred over the course of three years, in 1994, 1996, and 1997. These matters were brought to the attention of Chancellor Eakin. On April 28, 1997, Chancellor Eakin informed Dr. DeMarco of the Chancellor's intent to discharge him. Dr. DeMarco was immediately suspended. On or about May 5, 1997, Dr. DeMarco requested specifications as to the intended discharge. On May 8, 1997, those specifications were provided. Summarized, they are:

1. On April 12, 1994, during a departmental Graduate Admissions Committee meeting,

Dr. DeMarco twice used a profanity. This conduct resulted in an administrative reprimand.

2. On December 5, 1996, during a department meeting, Dr. DeMarco got into an altercation with one of his colleagues, Dr. Richard Shine. This incident involved physical contact between them.

3. On December 6, 1996, Dr. DeMarco was informed by the Department Chair that he would not have further clinical responsibilities, except for assessing clients for research. Dr. DeMarco had scheduled a clinic appointment on February 4, 1997. When the Department Chair learned of the appointment and raised the issue with Dr. DeMarco, Dr. DeMarco confronted him. (The Chair told Dr. DeMarco to go ahead with the appointment anyway, but Dr. DeMarco had to cancel the appointment due to fatigue.)

4. The incidents indicate a pattern of unprofessional conduct with the intent to intimidate colleagues, squelch academic discourse, and interfere with departmental functioning.

These specifications have nothing to do with Dr. DeMarco's MS. However, Dr. DeMarco has contended that the specifications were exaggerated or fabricated in order to concoct a basis for discharging him, due to his MS. Dr. DeMarco sought review of the specifications by a faculty Due Process Committee, as provided in the ECU Code and in the University of North Carolina Code.

It must be noted that this Committee, which was composed of six faculty members, is not a formal judicial

committee, regardless of the fact that it may hold hearings and issue a decision or report. No administrative law judge presides over it. Rules of evidence do not apply. The Committee does not have subpoena power. It does not entertain legal motions. Most significantly, witnesses before the Committee are not sworn. Without an oath being taken, it is difficult to determine the veracity of testimony.

Dr. DeMarco and ECU both were represented by counsel before this Committee. The Committee conducted a hearing over the course of 14 days, between June, 1997 and February, 1998. Several individuals testified. There was some expert testimony, including expert testimony as to MS. The University's EEO Officer testified that she was informed that Dr. DeMarco had MS and thus had a disability. However, Dr. DeMarco's treating neurologist did not testify. Dr. DeMarco himself mentioned his MS during his testimony, by way of explaining certain conduct. That is, regarding Specification No. 2 — the physical contact was not intentional but was a spastic reflexive reaction typical of his MS symptoms, and regarding Specification No. 3 — a flare up of MS symptoms caused the fatigue which necessitated that he cancel the clinic appointment after the Department Chair told Dr. DeMarco he could go ahead with the appointment. Nevertheless, the discussion of MS at the Committee hearing and Dr. DeMarco's reference to MS in his testimony did not, and was not designed to, constitute a formal disability discrimination claim.

Aside from these statements, little was said of Dr. DeMarco's MS in the 14 days of testimony. It is quite clear that MS played little or no role in the Committee's review of the specifications. The Due Process Committee issued its Report on March 6, 1998. In a carefully worded decision, the Committee *unanimously determined* the specifications either *were not proven at all* or were *not* serious enough to

support any conclusion that Dr. DeMarco is unfit to continue as a faculty member. Further, the Report does not *once* mention Dr. DeMarco's MS. [See Lodging, L27-L30].

A detailed description of the Report is not necessary at present. Nevertheless, regarding the Report, Dr. DeMarco points out [see L28-L29]:

> — Specification 1 (Dr. DeMarco's using an obscenity twice during a committee meeting) was discounted. The Report noted that according to testimony of several faculty members, obscenities were "routinely used" in such meetings. Also, after Dr. DeMarco was reprimanded, the Report states that there was no evidence that he "ever used obscenities again in any departmental meeting."
>
> — Specification 2 (physical contact incident with another faculty member) was deemed unfounded. The Report stated, "nothing in the testimony suggests that any premeditated or intentional act took place." Any comment by Dr. DeMarco to the other faculty member about teaching could be a "legitimate" concern over "teaching quality."
>
> — Specification 3 (conflict with Department Chair over clinic appointment which Dr. DeMarco later canceled) was also determined to be unfounded. The Report said the Department Chair's letter to Dr. DeMarco about no further clinic appointments did not state how appointments already made should be handled, and thus the letter itself created the problem. When the appointment was scheduled, Dr. DeMarco "still had full clinic privileges." The Report said, "The committee feels this conflict should have

> been settled between these two people immediately and not allowed to become an operational clinic issue."
>
> — Specification 4 (pattern of misconduct detrimental to University and Department functioning) was totally rejected. The Report said, "The committee finds there is no evidence that Dr. DeMarco deliberately engaged in a course of unprofessional conduct either as presented in Specifications 1, 2, and 3 or in other evidence presented during this Hearing." Further, "no evidence was presented to show that department productivity" had "decreased or was impaired" regarding the alleged incidents.

In other words, the entire situation came down to Dr. DeMarco's use of two obscenities at a single committee meeting — language not uncommon at these meetings. The Committee concluded, correctly, that this hardly was a sufficient circumstance for discharge. The Report additionally noted that during the time periods of these incidents, Dr. DeMarco's department was in administrative transition. It remarked, "In a department undergoing such fundamental changes and experiencing the inevitable conflict that accompanies such changes, blame for that conflict does not rest solely with one individual."

Chancellor Eakin reviewed the Report, but did not accept it. On April 15, 1998, he informed Dr. DeMarco that he was rejecting the Committee's findings and discharging him. This notification was accompanied by a 25-page review of the specifications, the Report, and the record. [See Lodging, L2-L26]. Interestingly, the Chancellor decided to make his own fact-findings and to reject the Committee's overall Report as well as its decision that the specifications were unfounded. The Chancellor instead stated that since the

Committee did not expressly find the alleged incidents did *not* occur, he must assume that they *did* occur. (A statement which, in itself, is not correct in several ways.) If the incidents occurred, he concluded, contrary to the Report, that they warranted discharge.

This review by Chancellor Eakin was not in the nature of judicial review. There were no arguments of counsel, no submissions of documents, and no pleadings. Further, as an additional indication that formal procedures were not followed, the Chancellor *considered prior incidents not part of the specifications themselves*, in deciding to dismiss Dr. DeMarco. (That discussion is found on pp. 4-6 of the Chancellor's review, in which he admits that these prior incidents were not part of the specifications. See L5-L7). Notably, Dr. DeMarco never received any notification regarding these prior incidents — assuming they occurred. They were based on unsworn testimony or reports, were not the subject of any reprimand, and were not part of the Due Process Committee's exhaustive review of the specifications. Dr. DeMarco never had an opportunity to respond to them. It was apparent that the Chancellor was dissatisfied with the Committee's Report and felt it necessary to draw upon other incidents, not noticed or subject to any challenge, for a discharge decision.

Chancellor Eakin's review of the discharge specifications mentioned only in passing Dr. DeMarco's MS. One reference is found on p. 9 of the review, regarding Specification No. 2, commenting that according to Dr. DeMarco, "Dr. Shine startled him and that spasticity due to Multiple Sclerosis caused him to make contact with Dr. Shine." This explanation was rejected, but as a matter of evidence, not as an express evaluation of Dr. DeMarco's MS and his ability to continue as a faculty member due to that condition. [L10]. Another reference is found on p. 13 of the review, regarding

Specification No. 3, noting that Dr. DeMarco explained he could not continue with the clinic appointment "due to stress which caused him to have an attack related to Multiple Sclerosis" and which caused him to "shut down" physically. This explanation was rejected, the Chancellor stating it was not corroborated by others in that situation and Dr. DeMarco did not previously mention MS to the Department Chair as an issue. [L14]. Again, this also was not an evaluation of Dr. DeMarco's MS or its effect upon his ability to continue as a faculty member. (The Chancellor's comment of lack of corroboration of Dr. DeMarco's MS as causing the fatigue requiring him to cancel the clinic appointment was incorrect — the parent who brought in the child for the appointment stated she knew Dr. DeMarco had MS, he looked "positively green around the gills," and he told her he was not feeling well.)

Dr. DeMarco sought review by the ECU's Board of Trustees. He raised the contention that the Chancellor's decision was incorrect both on the evidence and otherwise. He also contended that his MS played a role in the discharge decision. However, such a challenge to the Chancellor's decision, by way of arguments for further review, was not and could not have been a formal disability discrimination claim. On May 18, 1998, in a one-page letter, the Board of Trustees affirmed Chancellor Eakin. Again, this was not by way of a judicial-type review. The letter simply stated that after review of the Chancellor's decision by a subcommittee and discussion in full committee, the Board adopted the subcommittee recommendation to concur with the Chancellor. There was no discussion. There is no mention of Dr. DeMarco's MS.

Dr. DeMarco sought further review by the Board of Governors. In that petition for review, he raised numerous issues, including that Chancellor Eakin was not an impartial

decision maker consistent with due process, specifications were vague, Chancellor Eakin considered incidents outside the specifications, material which should not have been placed in his file was used to make a discharge decision, witnesses were intimidated, and the evidence did not support discharge. The petition also raised, as an argument, the question of disability discrimination in treatment and discharge due to his MS. (This is found beginning at p. 16 of Dr. DeMarco's petition, in a subsection titled, "Due Process and Disability Discrimination.") Dr. DeMarco stated that once a discharge decision occurs, if there was evidence the discharged person has a disability, a further hearing is necessary to determine if the discharge actually was based on disability, with the other bases being pretext.

The ECU response to Dr. DeMarco's arguments in his petition to the Board of Governors rejected the contention that disability discrimination even could have been involved in the discharge decision. ECU stated Dr. DeMarco referred to no section of the University Code that could have been violated in this respect, there was no finding that the Chancellor was aware of Dr. DeMarco's disability, "there is not even a definitive showing" that Dr. DeMarco "actually has multiple sclerosis" because the evidence was not strong enough and his physician did not testify before the Committee, and the Committee did not refer to Dr. DeMarco's MS in its Report. Dr. DeMarco replied to ECU's response. ECU made a further reply.

A review of the considerable documentation, hearing transcript, letters, and other material attached to these pleadings (which takes up hundreds of pages in the record index before the North Carolina Court of Appeals) indicates while MS was part of the discussion concerning propriety of procedures or the basis for discharge, Dr. DeMarco was not formally presenting a claim of discriminatory discharge due to his MS. Nor was that available in this context.

In a one-page notification dated September 11, 1998, the Board of Governors declined to consider the matter. [L1]. The Board found no violations of the ECU Code in the administrative and review process. (However, the ECU Code contains no specific prohibition as to disability discrimination). This concluded administrative activity.

B. Action in State Court, Decisions

Administrative avenues having been exhausted, Dr. DeMarco on June 12, 1998 filed a Petition for Review in North Carolina State Court (County of Wake). Again, he raised disability discrimination as a *contention* in his arguments, although there was no formal action or claim for relief. Exceptions raised in the Petition for Review were:

1. Constitutional Issues

a. lack of adequate notice and basis for charges.

b. lack of impartial decision maker consistent with requirements of due process

c. *the procedure, on its face and as applied, violated Dr. DeMarco's constitutional right not to be discriminated against because of his disability.*

2. Arbitrary and Capricious Decision

a. secret "working files" containing material not in the formal faculty file.

b. Dr. DeMarco was not permitted to confront and cross-examine material witnesses.

c. witnesses were intimidated.

3. Legal Error

a. requested conduct was unreasonable.

b. no warnings given.

c. isolated incidents of misconduct.

d. consideration of matters outside record.

e. *discrimination based on disability.*

As to the disability issues, Dr. DeMarco stated in exception 1.c. that the Committee's Report could not have even reached any disability issue, since it decided instead that the evidence did not warrant dismissal. However, Chancellor Eakin's decision finding cause for dismissal "triggered" a second issue of whether dismissal was, in fact, disability discrimination. Yet no new hearing was held on that secondary issue. That is, "Dr. DeMarco was deprived of his constitutional right to a full and fair hearing regarding whether he was discriminated against because of his disability before the final decision."

As to exception 3.e., Dr. DeMarco stated disability discrimination violates State and Federal law (although the University Code contains no provision prohibiting it). Once the Chancellor found cause for dismissal, where the Committee had found none, the issue was presented whether these specifications were a pre-text for discrimination. Yet, the Chancellor's decision "did not analyze whether appropriate accommodations were made for Dr. DeMarco's M.S. or whether any of the decisions leading to Dr. DeMarco's discharge were based on impermissible discriminatory or retaliatory motives." Such an analysis "is required by both federal and state law."

These exceptions further were discussed in Dr. DeMarco's extensive, 42-page brief before the State Court. References were made to testimony and documentation before the Committee as to Dr. DeMarco's MS. Two letters were by Dr. DeMarco to his Department Chair in March 1996, where he said he has MS and is "constantly battling fatigue" due to this disease and is being "evaluated medically." Additional references were made to the extent of knowledge of colleagues, Department chair and staff, and University officials of Dr. DeMarco's MS and its effects.

In its brief filed in the State Court by ECU, ECU *again* contended Dr. DeMarco's disability *was not a factor in the dismissal decision*. Once more, ECU stated, "Whether [Dr. DeMarco] has or does not have multiple sclerosis was not an issue in the specifications, nor was it decided by the Due Process Committee that heard the grievance. In fact, the Due Process Committee made no finding whatsoever concerning petitioner's testimony about multiple sclerosis. The words 'multiple sclerosis' do not even appear in the Due Process Committee's Report." (P. 34 of ECU's response.) ECU further stated that any mention of MS by the Chancellor in his review of the Report was only by way of evidence. That is, the Chancellor, "just like the Due Process Committee, made no finding whatsoever regarding [Dr. DeMarco's] testimony that he had" MS. Also, ECU *again* contended that *"it has never been legally established" that Dr. DeMarco has MS*, stating that the evidence in this regard was only Dr. DeMarco's testimony, there is "conflicting data" in the medical files, and Dr. DeMarco's physician had declined to testify. ECU stated, "In short, nothing in the record establishes" Dr. DeMarco "does, in fact, suffer from multiple sclerosis."

On December 29, 1999, the State Court (Stephens, J.) dismissed the petition for review. [23a-27a]. Despite

supposed consideration of extensive memoranda from both parties and a record comprising five notebooks of material, the Court issued a short, three-page decision. *The Court made no specific findings regarding Dr. DeMarco's arguments as to disability discrimination based on his MS or as to ECU's contention that Dr. DeMarco did not demonstrate he has MS*, let alone that he was subject to unlawful employment discrimination on that basis. The State Court simply stated [25a-26a]:

> The Court has carefully reviewed all the evidence and matters of record in this case. The evidence which the Chancellor found to be accurate, true and credible was substantial admissible evidence which was sufficient to demonstrate willful deliberate unprofessional conduct intentionally engaged in by the Petitioner for the purpose of intimidating colleagues, squelching academic dis-course and interfering with the administration of the Department's teaching, research and service mission.
>
> The whole record demonstrates no violation of any constitutional or statutory right of the Petitioner. This governmental agency did not act in excess of its statutory authority or outside or beyond its jurisdiction. The agency did not act upon or through any unlawful procedure nor any error of law. The final decision is supported by substantial admissible evidence in view of the entire record as submitted. The final agency decision is not arbitrary or capricious. No substantial right of the Petitioner has been violated.

Had the State Court ruled on any discrimination exceptions raised by Dr. DeMarco, it might have been

required to remand the matter for further evidentiary proceedings at the administrative level, given ECU's contention that there was insufficient evidence before the Due Process Committee that Dr. DeMarco has MS. Still, the Court's decision, rendered in the classic language of judicial review of administrative matters, was not be a judicial determination of Dr. DeMarco's statements that his discharge was unlawful employment discrimination based on his disability. There is no mention in it of MS, whatever.

Dr. DeMarco appealed to the North Carolina Court of Appeals. On May 1, 2001, in a 9-page opinion, that Court affirmed. [4a-13a]. The Court, in summarizing the background, referred only to the specifications. [5a-8a]. It noted the scope of judicial review of administrative matters under State law (see N.C. Gen. Stat. § 150B-51(b)). [8a-9a]. It stated judicial review can be a review of the administrative record or *de novo* review, based on the nature of the case and the issues raised. It found that as to exceptions relating to alleged errors of law, the trial Court conducted the proper *de novo* review and properly found there were no errors of law. The Court of Appeals found, as to other issues, that the trial court conducted a "whole record" review and properly found the evidence before the Chancellor warranted discharge. It then simply stated, reasserting these conclusions, that the trial court judgment was affirmed. [See discussion at 10a-12a].

As with the trial court, the State Court of Appeals made no mention of Dr. DeMarco's disability discrimination exceptions. It did not conclude whether these issues were properly raised or whether the State court should have remanded for factual findings, given that the parties disputed whether the evidence permitted a conclusion that Dr. DeMarco has MS. It affirmed on an overall basis.

C. Federal Court Action, Decisions

On May 14, 1999, Dr. DeMarco, after submitting a discrimination claim to the EEOC on April 19, 1998 and receiving a right to sue letter on February 17, 1999, filed a comprehensive action in the United States District Court (The decision by the State trial court was then pending.) In this action (see also Amended Complaint, filed May 25, 1999), he *specifically, and for the first time*, raised an actual *claim of employment discrimination based on disability, as a violation of the Americans with Disabilities Act.* The Complaint alleged: Dr. DeMarco is a disabled person under the ADA, the disability affects employment, he requested reasonable accommodations which were not met, he has a property interest in continued employment, and his discharge was discriminatory. He raised an ADA claim, a retaliation claim, and other claims not relevant here, such as negligent and intentional infliction of emotional distress, denial of due process, and denial of rights to free speech and association.

ECU filed a motion to dismiss. ECU's challenge to the ADA claims included limitations, unavailability of the causes of action, immunity, failure properly to allege an ADA claim ripe for adjudication, failure to show that MS constitutes a sufficient impairment of function qualifying it as a disability for ADA purposes, and similar statements. ECU's response to the other claims is not relevant here. Numerous exhibits were attached. Dr. DeMarco responded with a memoranda and exhibits. ECU filed a reply.

On January 10, 2000, following the State trial court decision of December 29, 1999 dismissing Dr. DeMarco's petition for review before that Court, ECU then filed a supplemental brief as to its dismissal motion. ECU contended that Dr. DeMarco's ADA claim now must be dismissed due

to *res judicata* because the claim has been decided and adjudicated in prior administrative and in State court proceedings. ECU relied upon 28 U.S.C. § 1738.

ECU maintained that because Dr. DeMarco raised disability discrimination contentions before the State court in his petition for review, the State court decision dismissing his petition "necessarily decided" a discrimination claim, even if it was not expressly mentioned by that decision. That is, "Plaintiff's claims under the ADA, his § 1983 due process claims and his claims under the N.C. Constitution are barred by res judicata and should be dismissed as a matter of law."

Nowhere in this supplemental memorandum does ECU mention that before the State courts, it challenged Dr. DeMarco's statement as to his MS. Nowhere does ECU note that before the State courts, it maintained Dr. DeMarco had not yet legally demonstrated that he even had MS. ECU also sought dismissal as to all claims in Dr. DeMarco's Amended Complaint, asserting all claims arise from the same set of events and all were or could have been decided in State Court. Because the State Court found no illegality or error in administrative proceedings, any claim now raised by Dr. DeMarco based on those proceedings is precluded.

Dr. DeMarco responded. Before that response was filed, the District Court (Howard, J.) issued its Order on February 25, 2000 granting dismissal. [17a-23a]. The Court found the State Court had considered the same claims now raised by Dr. DeMarco. The District Court stated [21a-22a, citations omitted]:

> The doctrine of claim preclusion, or *res judicata*, bars a subsequent lawsuit when there exists (1) a final judgment on the merits in an

> earlier suit, (2) an identity of the cause of action in the first and second suits, and (3) an identity of parties or their privies in the two suits. As DeMarco's state case was resolved by a final judgment on the merits, and the parties are identical in both actions, the critical element in resolving this dispute centers around the identity of the causes of action in the state and federal suits.
>
> In analyzing the identity of the causes of action, "it is the substance of the actions that must be compared and not their form." In this case, the court finds that the substance of the state and federal causes of action are identical. The state and federal causes of action arose from the same set of facts, namely DeMarco's discharge. Both suits contest whether his discharge violated his due process rights. Both suits contest whether the discharge occurred as a result of disability discrimination. Both suits contest whether the decision to discharge him was made in an arbitrary and capricious manner. The court cannot find a single factor that distinguishes the state suit from the federal suit. Accordingly, all of DeMarco's claims are barred by the doctrine of *res judicata*. Defendants' motion to dismiss is GRANTED.

The District Court later noted that Dr. DeMarco had responded to ECU's supplemental memorandum. It stayed its Order of Dismissal to consider that response. On October 11, 2000, reaffirmed its earlier decision.

On appeal, the Court of Appeals for the Fourth Circuit, in a brief, unreported opinion issued October 19, 2001, affirmed. [1a-3a]. It stated [3a, citations omitted]:

> Federal courts must give preclusive effect to state court judgments where the state courts would do so.

28 U.S.C. § 1738 (1994). Since North Carolina law would bar any further action by DeMarco, the full faith and credit doctrine precludes federal adjudication of his federal suit. Our review of the pleadings in the state case and the state court's decision confirms that the issues raised in the federal suit were adjudicated in the state suit. We also find that all of DeMarco's causes of action arise from the same transaction. Accordingly, the district court properly concluded that DeMarco's federal actions were barred under the doctrine of res judicata.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT AND DECIDING PETITIONER'S A.D.A. CLAIMS WERE BARRED BY *RES JUDICATA*.

It was error in the extreme, warranting review by this Court, for the District Court to dismiss Petitioner's ADA claims on the basis of *res judicata* and for the Fourth Circuit to approve that dismissal. Although the parties in the Federal and State proceedings were the same and the claims presented to the District Court in Petitioner's Amended Complaint arose from the same operative facts, the *claims* were not the same, nor were they decided at the administrative or State court levels. Particularly noteworthy in the *res judicata* analysis here is the fact that, at the State court levels, Respondents *denied that Petitioner even had MS*. Surely, a claim cannot be decided in the State court *if the factual basis for that claim is in dispute*.

The purpose of 28 U.S.C. § 1738 is to give full faith and credit in Federal courts to proper determinations in State

courts. By this policy, Federal courts are spared from crowding their dockets with additional actions, Federal and State courts are less likely to issue inconsistent decisions on the same claims or issues, litigation is finalized, responding parties need not endure the expense of additional litigation on matters already decided, and judicial resources are conserved. Under § 1738, Federal courts apply State rules concerning judgment preclusion, subject to requirements of the due process clause, so that States may determine the preclusive effect of judgments in their own courts. *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518 (1986).

In *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), this Court applied *res judicata* principles to an employment discrimination claim. The matter began with a claim filed under Title VII of the Civil Rights Act of 1964 of unlawful discharge due to national origin and religion. The claim was referred to a State (New York) employment discrimination agency, which determined it to be unfounded. That decision was affirmed by an administrative appeal and a further appeal to the Appellate Division of the New York Supreme Court. Subsequently, the plaintiff filed a similar if not identical claim in United States District Court. The District Court dismissed on the basis of *res judicata*, which decision was affirmed on appeal.

Affirming, this Court in *Kremer* first determined that there was no express or implied repeal in the Civil Rights Act of 1964 of the *res judicata* principles codified or incorporated into § 1738. See *Allen v. McCurry*, 449 U.S. 90 (1980). That discussion, which takes up a large part of the *Kremer* decision, is not at issue here.

Further reviewing the *res judicata* issue, the Court stated that the Title VII claims before the State and Federal courts were sufficiently similar as to be considered the same claims

for these purposes. Regarding the quality of administrative review, the Court stated that *res judicata* or collateral estoppel does not apply "when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate the claim or issue." 456 U.S. at 481, citing, e.g., *Allen, supra*, and *Montana v. United States*, 440 U.S. 147 (1979). That is, "'redetermination of an issue is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation.'" Citing *Montana*.

So long as State proceedings satisfy "minimal" due process standards, they are sufficient for preclusive effect under § 1738. That is, a court cannot give preclusive effect to a "constitutionally infirm judgment." 481 U.S. at 482. In the situation before it, the Court concluded, "We have little doubt that Kremer received all the process that was constitutionally required in rejecting his claim that he had been discriminatorily discharged contrary to the statute." Reviewing the process in the case before it, it said that this "panoply of procedures, complemented by administrative as well as judicial review, is sufficient under the Due Process Clause." 481 U.S. at 484.

In *Montana*, concerning a challenge to a tax on contractors which was rejected by State courts including the Supreme Court of Montana but which was considered by the Federal District Court in a later action (the District Court finding that *res judicata* did not apply), this Court reversed. The Court stated that under relevant principles, a " 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies.' " 440 U.S. at 152, citing *Southern Pacific Railway Co. v. United States*, 168 U.S. 1 (1897). This Court commented that under the related doctrine of collateral estoppel, "once an issue is actually and necessarily

determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of actio involving a party to the prior litigation." The parties must have had a "full and fair opportunity" to litigate those issues. 440 U.S. at 153, and cases cited. The Court found that the tax issue raised in State court was similar or identical to the same tax issue or challenge presented in Federal court.

In *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984), the Court considered a teacher in Ohio who had challenged her dismissal. In a State court action based on breach of contract, she was awarded reinstatement and damages. She later filed a claim in Federal court charging discrimination in dismissal under 42 U.S.C. § 1983 allegedly because of her activities supporting school desegregation. The District Court dismissed her claim as barred by *res judicata*.

This Court vacated and remanded so that the District Court could apply Ohio law to the question of preclusive effect of the State court judgment as to the breach of contract claim, to the later § 1983 action. This Court observed, at 465 U.S. 83 [citations and footnotes omitted]:

> Section 1983, however, does not override state preclusion law and guarantee petitioner a right to proceed to judgment in state court on her state claims and then turn to federal court for adjudication of her federal claims. We hold, therefore, that petitioner's state-court judgment in this litigation has the same claim preclusive effect in federal court that the judgment would have in the Ohio state courts.

Reviewing Ohio cases, the *Migra* Court suggested that Ohio may have a different view of the effect of the breach of contract action as precluding other claims such as a discrimination claim. The Court thus remanded for a further consideration by the District Court of Ohio law.

A recent discussion of the similar principle of judicial estoppel was taken up by this Court in *New Hampshire v. Maine*, 532 U.S. __, 149 L. Ed. 2d 968, 121 S. Ct. __ (2001). In this border dispute, this Court concluded that certain contentions made by New Hampshire were determined in prior litigation before the Court, and thus judicial estoppel barred the claims. The Court commented that judicial estoppel prevents a party from taking one position in a given legal proceeding and then adopting a contrary position in a subsequent proceeding. 149 L. Ed. 2d at 977, citing *Pegram v. Herdich*, 530 U.S. 211 (2000). The rule is applied to protect the integrity of the judicial process. See discussion, citing, e.g., *Allen v. Zurich Insurance Co.*, 667 F.2d 1162 (4th Cir. 1982); *Edwards v. Aetna Life Insurance Co.*, 690 F.2d 595 (6th Cir. 1982), and *In re Cassidy*, 892 F.2d 637 (7th Cir. 1990).

Factors relevant to applying judicial estoppel include whether the later position asserted by a party is clearly inconsistent with its prior position, whether the party persuaded a court in the earlier proceeding to accept its position, whether there is a risk of inconsistent determinations, and whether the party asserting the inconsistent position would derive an unfair advantage over the other party if not prevented from doing so.

Moreover, in *Richards v. Jefferson County*, 517 U.S. 793 (1996), this Court found *res judicata* could not be applied to bar a Federal cause of action. A challenge to an occupational tax imposed by an Alabama County was advanced by

taxpayers and a municipality and was rejected by the State's Supreme Court. Subsequently, another State court action was filed by other affected taxpayers, seeking a class action, and raising among other things claims of denial of due process and equal protection under the Fourteenth Amendment. The State trial court determined that *res judicata* did not apply to the Federal claims, but the Alabama Supreme Court reversed.

Reversing that decision, this Court in *Richards* stated, as to Federal due process claims, that any similar and prior claims in the previous litigation were not fully and fairly adjudicated. Further, this Court stated that an *extreme application of State-law res judicata principles violates due process*, particularly if the prior decision involved different parties or where the parties were not adequately represented. *See Hansberry v. Lee*, 311 U.S. 32 (1940). That is, the right to due process has little worth unless one can personally appear to litigate a particular issue and unless that issue is fairly litigated. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Schroeder v. City of New York*, 371 U.S. 208 (1962), and *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930), especially discussion at 281 U.S. at 681-682.

Other decisions of this Court concerning *res judicata* make similar declarations regarding this well-established doctrine. *See, e.g., Covington v. First National Bank*, 198 U.S. 100 (1905); *Wright v. Georgia R & B. Co.*, 216 U.S. 420 (1910); *Brown v. Felsen*, 442 U.S. 127 (1979); and *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988). See Annotation, 72 L. Ed. 2d 911, "Supreme Court's View As to Res Judicata Or Collateral Estoppel of State Court Judgments on Federal Courts."

Consistent with these principles, and even taking into account the broad purpose of issue preclusion in § 1738, a

full and fair application of *res judicata*, as reflected in the opinions of this Court, requires precisely the *opposite* conclusion than the one reached by the District Court in this matter. The District Court erred in dismissing Petitioners claims, and the Fourth Circuit erred in affirming.

Petitioner's ADA claim was *never* presented to *any* State decisionmaking or adjudicative body. His appearance before the Due Process Committee was to respond to the four specifications asserted against him by the Chancellor. The Committee's review, in turn, was limited to those specifications. Petitioner was not in a position, given the nature of the proceedings, to raise new issues or to present a new claim. At the hearing before the Due Process Committee, Petitioner raised his MS as part of his explanation for some of the allegedly offending conduct. There was some testimony as to the effects of MS. But the Committee did not decide any of the issues with respect to MS. Rather, the Committee concluded the specifications were unfounded and that dismissal was not warranted.

Chancellor Eakin, in rejecting the Committee's Report and discharging Petitioner, for the first time generated a situation in which Petitioner could challenge his *discharge* as based on unfounded specifications and actually motivated by discriminatory purposes. However, Petitioner first chose to challenge that decision on the merits. He did so through two levels of University review (Board of Trustees and Board of Governors). In each instance, however, the opinion affirming the Chancellor was brief and generalized and did not address any discriminatory claim — assuming that such a claim could be asserted or formally was before these other administrative bodies.

Petitioner did raise discrimination *arguments* in his petition for review before the State trial court. However, those

arguments were only part of a host of issues directed to the propriety and correctness of the Chancellor's decision and the University procedures. *There was no precise ADA claim of discriminatory discharge presented to that trial court.* In the context of a review of the administrative decisions and given the nature of the administrative decisions, such a claim could not have been presented.

Nor was any such claim adjudicated before the State court, in any event. Respondents' reaction to Petitioner's contentions before the State trial court regarding his MS was that Petitioner *had not established at the administrative level that he had MS.* The State trial court dismissed the petition for review in generalized language, in an overall context of judicial review of administrative decisions. The term "MS" does not appear in that decision. The same can be said for the decision by the State Court of Appeals. There never has been a direct, clear, adjudicated determination at the administrative or State court levels of Petitioner's claim that his discharge violated the ADA. Petitioner's *first* formal presentation of an ADA claim was made in the Federal District Court. Here — contrary to the position taken in the State courts — Respondents maintained such a claim *was* properly before the State trial court and was "necessarily decided" when that court dismissed the petition for review. Nothing could be farther from the truth.

Petitioner is aware that, as noted by the Fourth Circuit, under § 1738 Federal courts are to give preclusive effect to a State court judgment if the courts of that State would do so. Yet there is nothing so unusual about *res judicata* principles adopted by North Carolina courts which would support this result. According to North Carolina courts, *res judicata* precludes subsequent litigation or claims if the parties and facts are the same and the claim involved was litigated to a final determination in a competent court. *See King v.*

Grindstaff, 284 N.C. 348, 200 S.E.2d 799 (1973); *Bockweg v. Anderson*, 333 N.C. 486, 428 S.E.2d 157 (1993); *McGowan v. Argo Travel*, Inc., 131 N.C. App. 694, 507 S.E.2d 601 (1998), and *Holly Farm Foods, Inc. v. Kuykendall*, 114 N.C. App. 412, 442 S.E.2d 94 (1994).

As North Carolina applies the doctrine, later actions or claims are precluded if the issues were the same as the ones in the prior action, the issues were raised, litigated, and determined, determination of the issues involved was necessary to the outcome of the case, and a final judgment was rendered on the merits regarding those issues. Despite Respondents' contentions otherwise before the District Court and Fourth Circuit, nothing of the sort occurred here. This was not an ADA claim from the start — it was a challenge to specifications for Petitioners' discharge as a faculty member, reviewed by an internal faculty committee. No ADA claim was or could have been made then, since the Committee had no jurisdiction to consider it. No ADA claim was considered by the Chancellor or the other levels of internal administrative review. No ADA claim could have been raised as part of judicial review.

The fact that disability discrimination arguments were made in the petition for review does not mean they were necessarily decided. Certainly, there was no mention of these arguments by the State courts. This case is not one in which material and relevant matters within the scope of the pleadings are decided when the case is decided. *See Peugot Motors of America, Inc. v. Eastern Auto Distributors, Inc.*, 892 F.2d 355 (4th Cir. 1989). This assumes a particular *claim for relief* has been made, with attendant allegations and request for damages. That was not the case in the petition for review, nor could it have been.

In civil rights contexts, other Federal courts have declined to apply *res judicata* where previous State court

judgments did not involve a full and fair consideration or review of any similar prior claim. See *Thomas v. Contoocook Valley School District*, 150 F.3d 31 (1st Cir. 1998) (State court did not review agency determinations); *McNasby v. Crown Cork and Seal Co., Inc.*, 888 F.2d 270 (3d Cir. 1989) (Title VII action not precluded even though plaintiff had commenced sex discrimination proceedings in State court); *Garner v. Giarrusso*, 571 F.2d 1330 (5th Cir. 1978) (civil rights claim not precluded where State administrative agency had no jurisdiction to consider such claim, agency determinations were based on narrower matters and applying *res judicata* would contravene important public policy favoring litigation of claims); *Carlisle v. Phenix City Board of Education*, 849 F.2d 1376 (11th Cir. 1988) (plaintiff's § 1983 and Title VII race discrimination claims not precluded by prior State proceedings affirming employment action as not political or arbitrary, where it was not clear that administrative proceeds were or could have been open to discrimination claims); *Johnson v. New York City Transit Authority*, 639 F. Supp. 887 (E.D.N.Y. 1986) (issues in Title VII complaint not fully resolved in State court proceedings, or merely considered by State administrative tribunals, not precluded), and *Bennett v. Monon Trailer Corp.*, 631 F. Supp. 724 (N.D. Ind. 1985) (decision of appeals panels of State agency that employee was discharged for unjust cause did not preclude later Title VII action alleging religious discrimination). Compare, *Burney v. Polk Community College*, 728 F.2d 1374 (11th Cir. 1984) (State court affirmance of decision by college board of trustees *that tenured guidance counselor's discharge was not racially motivated* bars later Title VII action alleging same claim). And see, Annotation, 20 A.L.R. Fed. 963, "Effect of Prior State Agency Adjudication Upon Court Action for Unlawful Employment Practices Under § 706 of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5)." To the extent Federal Circuits have differed on this issue, any conflict is an even stronger basis for review by this Court.

Indeed, applying of *res judicata* in this context frustrates the judicial process and contravenes the Due Process Clause of the Fourteenth Amendment. Although this Court in *Kremer* found there was no public policy or Congressional intent indicating claims under the Civil Rights Act are an exception to § 1738 preclusion, this Court noted the significant public policy interests surrounding that Act. Similarly, significant public policy interests are at work in the ADA. (*See* 42 U.S.C. § 12101, findings and purpose, noting that 43 million Americans have one or more physical or mental disability). It was the intent of Congress in enacting the ADA that these claims be fully and fairly decided, not be subject to overbroad and improper applications of *res judicata* as to State court review of administrative decisions where no formal ADA claim ever was or could have been brought.

Nor should *res judicata* be employed to ensnare a party in a procedural loop: if a disability discrimination argument was not presented in State proceedings, it could deem to be waived, if such an argument was presented in State proceeding, it would deemed to be a formal discrimination claim decided and resolved in the State proceedings and precluding a formal discrimination claim in a later Federal action. It was not the case that the issues in the Federal action were decided by the State courts. No actual claim of disability discrimination, invoking the ADA and seeking relief, had ever been submitted in State proceedings. Respondents' contentions in Federal court that such a claim was submitted and decided in State courts is belied by Respondents' consistent assertions in the State courts that Petitioner had yet to legally demonstrate that he had MS and that this condition resulted in an employment disability within the scope of the ADA. Consequently, the District Court could not properly have found that Petitioner's ADA claim was resolved in the State administrative or judicial proceedings. Its decision to adopt the Respondents' contentions and apply

res judicata to preclude this significant issue, which has yet to be properly litigated, was error. The Fourth Circuit should not have affirmed it. Review of these circumstances and issues by this Court is warranted.

CONCLUSION

Therefore, consistent with these principles, North Carolina *res judicata* principles, and strong Congressional interests of the ADA, it was error for the District Court to dismiss Petitioner's Amended Complaint. This Court should GRANT this Petition to review this matter, clarify the effect of *res judicata* in these circumstances, and remand the case to the District Court for further proceedings.

Therefore, Petitioner Salvatore DeMarco requests of this Court that it GRANT his Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

SALVATORE DEMARCO
Petitioner, Pro Se
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Greenville, NC 27858
(252) 758-7515

APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED AND DECIDED OCTOBER 19, 2001

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 00-2440

SALVATORE DEMARCO,

Plaintiff-Appellant,

v.

UNIVERSITY OF NORTH CAROLINA, through its Board of Governors; EAST CAROLINA UNIVERSITY, the Department of Communications, Science and Disorders; RICHARD R. EAKINS, Chancellor; JAMES HALLOCK, Vice Chancellor; MICHAEL RASTATTER,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Greenville. Malcolm J. Howard, District Judge. (CA-99-62-4-H)

Submitted: September 20, 2001

Decided: October 19, 2001

Before WILKINS, LUTTIG, and WILLIAMS, Circuit Judges.

* * *

Appendix A

OPINION

PER CURIAM:

Salvatore DeMarco appeals the dismissal on res judicata grounds of his federal claims arising out of his termination from employment as a professor at East Carolina University. DeMarco's federal action alleged due process violations under the United States and North Carolina constitutions, wrongful termination under Title I of the Americans with Disabilities Act and North Carolina law, negligent and intentional infliction of emotional distress, and violation of his First Amendment rights to free speech and association.

DeMarco received written notification from Chancellor Richard Eakins that he was suspended from his position and Eakins intended to permanently discharge him. DeMarco challenged his discharge through the available state administrative proceedings. After exhausting his administrative remedies, DeMarco petitioned the Wake County, North Carolina Superior Court for review. In his petition before the North Carolina court, DeMarco alleged due process violations under both the United States and North Carolina constitutions, discrimination based on his disability, the decision to terminate his employment was arbitrary and capricious, and other errors of law. The North Carolina court affirmed the final agency decision and dismissed DeMarco's petition with prejudice on December 23, 1999. The state court found "no violation of any constitutional or statutory right of the Petitioner."

DeMarco filed his suit in federal court on May 14, 1999. On motion by the Defendants, the district court dismissed

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DeMarco's suit as barred by the doctrine of res judicata on October 11, 2000. Federal courts must give preclusive effect to state court judgements where the state courts would do so. 28 U.S.C. § 1738 (1994). Since North Carolina law would bar any further action by DeMarco, the full faith and credit doctrine precludes federal adjudication of his federal suit. *See Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984); *Rao v. County of Fairfax*, 108 F.3d 42, 44 (4th Cir. 1997). Our review of the pleadings in the state case and the state court's decision con-firms that the issues raised in the federal suit were adjudicated in the state suit. *Keith v. Aldridge*, 900 F.2d 736, 739 (4th Cir. 1990). We also find that all of DeMarco's causes of action arise from the same transaction. *See Meekins v. United States Transportation Union*, 946 F.2d 1054, 1058 (4th Cir. 1991). Accordingly, the district court properly concluded that DeMarco's federal actions were barred under the doctrine of res judicata.

For the first time on appeal, DeMarco challenges the veracity of unsworn testimony offered at his administrative hearing. This court will not address issues raised for the first time on appeal except in exceptional circumstances. *See Grossman v. Commr.*, 182 F.3d 275, 280-81 (4th Cir. 1999); *Hormel v. Helvering*, 312 U.S. 552, 556 (1941). Because no exceptional circumstances exist in this case, we decline to consider this claim.

We affirm the district court's finding that DeMarco's federal suit is barred by the doctrine of res judicata. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid in the decisional process.

AFFIRMED

APPENDIX B — OPINION OF THE NORTH CAROLINA COURT OF APPEALS DATED AND FILED MAY 1, 2001

NO. COA00-372

NORTH CAROLINA COURT OF APPEALS

Filed: 1 May 2001

DR. SALVATORE DEMARCO,

Petitioner-Appellant

v.

EAST CAROLINA UNIVERSITY,

Respondent-Appellee

Wake County
No. 98 CVS 11776

Appeal by petitioner from judgment entered 23 December 1999 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 26 January 2001.

* * *

CAMPBELL, Judge.

On 28 April, 1997, Richard R. Eakin, Chancellor of East Carolina University (ECU), sent a letter notifying petitioner

of the Chancellor's intent to discharge petitioner, a tenured faculty member with the University. At the petitioner's request, Chancellor Eakin then set forth four specifications consisting of such misconduct as he considered to be of such a nature as to indicate that petitioner was unfit to continue as a member of the faculty at ECU.

As was his right, petitioner requested a hearing before the ECU Due Process Hearing Committee (Committee), a group of tenured faculty at the University. After some fourteen days of hearings in which the Committee heard witnesses and reviewed evidence, it unanimously recommended that petitioner be retained as a tenured faculty member at the University based on the Committee's opinion that petitioner did not commit misconduct of such a nature as to make him unfit to be a faculty member.

The recommendation of the Committee was then reviewed by Chancellor Eakin (as the final agency decision maker), and on 15 April 1998, he notified petitioner that he was rejecting the Committee's recommendation and discharging petitioner. Chancellor Eakin elaborated on his review of the evidence relating to the four specifications and his reasons for rejecting the recommendation of the Committee in a document also dated 15 April 1998 and included with his letter.

The ECU Board of Trustees then reviewed Chancellor Eakin's decision, and in a letter dated 18 May 1998, concurred with the Chancellor's decision. Petitioner then petitioned the University of North Carolina Board of Governors for a further review. Based upon a review and recommendation by the

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Board of Governors' Committee on Personnel and Tenure which had before it the substantial record that had been developed up to that point, the Board of Governors found nothing to warrant further consideration of the matter and declined jurisdiction on 11 September 1998.

Having exhausted all of his remedies at the agency level, petitioner, pursuant to N.C. Gen. Stat. § 1509-45 (1999), filed a petition for review in the Superior Court in Wake County. The matter came on before Judge Donald W. Stephens, who after considering the matter, affirmed Chancellor Eakin's decision and dismissed the action with prejudice in an order filed 29 December 1999. It is from this ruling that petitioner now appeals.

Chancellor Eakin's decision was based upon the following four specifications, each of which he found to be conduct that was unprofessional and detrimental to the University's mission.

Specification 1

On 12 April 1994, petitioner shouted obscenities at faculty colleagues during a departmental Graduate Admissions Committee meeting, saying he was "sick of this f***ing bulls**t" and that the faculty should "get it f***ing straight."

There was also evidence that during the meeting, petitioner put his face in another colleague's face, pointed his finger at the colleague, and told him they should go outside and settle the issue. Petitioner stated he wasn't scared of the colleague, and that he could "kick his [the colleague's] ass."

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Petitioner was warned that the University would not tolerate such outrageous and disruptive behavior, and that any further acts of similar misconduct might subject him to more serious disciplinary action.

Specification 2

On 5 December 1996, petitioner verbally and physically attacked a different colleague. Petitioner shoved the colleague and ridiculed him in the presence of other colleagues, saying such things as "nobody respects you," and that the colleague was a "joke" and the "laughing stock" of the profession. Petitioner even continued this attack while walking down the hall after the meeting had adjourned.

Specification 3

On 6 December 1996, petitioner was given express orders from the chair of the Department that he was not to "maintain any level of clinical activity (faculty, clinical, or student training), except for assessing clients for purposes of research." Petitioner ignored this order, and scheduled a clinical appointment on 4 February 1997. When he was confronted by his superior, petitioner accused him of interfering with the client's treatment. The superior then told petitioner to continue the exam since the client was already present. After being allowed to continue, petitioner stated he was going to tell the client that he could not do the exam because his superior was interfering and not allowing the testing to take place. Petitioner later refused to perform the exam and stated several times that his superior could not "tell [him] what to do."

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Specification 4

Petitioner has interfered with the Department's efforts to accomplish its teaching, research, and service missions by physically and verbally attacking his colleagues and by deliberately engaging in a course of unprofessional conduct. University faculty felt intimidated by petitioner's behavior, and did not initiate disciplinary charges due to fear of retaliation. Several of the faculty had reported emotional problems as a result of petitioner's conduct and were afraid to speak during departmental meetings for fear of being ridiculed.

After a thorough review of these findings, the trial court upheld the Chancellor's decision to dismiss petitioner.

The scope of review in the superior court of a final agency decision is set forth in N.C. Gen. Stat. § 150B-51(b) (1999), which reads:

> [T]he court reviewing a final decision may affirm the decision of the agency or remand the case for further proceedings. It may also reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary or capricious.

The standard of review to be applied depends upon the nature of the issues presented in appealing from the final agency decision. *Act-Up Triangle v. Comm'n for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 389, 392 (1997) (citing *Amanini v. N.C. Dep't of Human Res.*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994)). Depending on the issues presented, there are two different standards of review: (1) the "whole record" test, the standard of review employed where petitioner complains that an agency decision is not supported by sufficient evidence or that the decision is arbitrary or capricious; and (2) *de novo* review, the standard of review employed where petitioner complains that the agency decision is based on an error of law. Under the "whole record" test, the trial court must examine the record used by the agency and determine if it contains substantial evidence which would support the agency's decision. *Amanini v. N.C. Dep't of Human Res.*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994). On the other hand, a *de novo* review requires that the trial court "consider a question anew, as if not considered or decided by the agency." *Id.* If the petitioner in his assignments of error alleges an error of law, the trial court

must conduct a *de novo* review. *In re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993). However, where the petitioner "questions (1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the 'whole record' test." *Id.*

Upon appeal to this Court, we are required to review the superior court's decision as we would " 'any other civil case — [meaning a] consideration of whether the [superior] court committed any error of law.' " *Amanini*, 114 N.C. App. at 675, 443 S.E.2d at 118 (quoting *McCrary*, 112 N.C. App. at 165, 435 S.E.2d at 363). In doing so, we must: "(1) determin[e] whether the trial court exercised the appropriate scope of review and, if appropriate, (2) decid[e] whether the court did so properly." *Id.* at 675, 443 S.E.2d at 118-19.

In the case *sub judice*, petitioner alleged both errors of law and that the agency's decision was arbitrary and capricious. Therefore, the trial court was required to conduct both types of review — a *de novo* review for the errors of law, and a whole record review to resolve the arbitrary and capricious allegations.

The first determination the trial court had to make was whether the agency had "correctly applied the law — an issue which could only be resolved by the trial court's application of the '*de novo*' standard of review." *Jordan v. Civil Serv. Bd. of Charlotte*, 137 N.C. App. 575, 578, 528 S.E.2d 927, 930 (2000). Petitioner alleged several errors of law before the trial court. He alleged it was error to discharge a vested State employee for misconduct for failing to carry out

requested conduct that is unreasonable; that it was error to discharge a vested State employee for misconduct if the misconduct had previously been the accepted standard; and that it was error to discharge a tenured faculty member for isolated instances of different types of conduct. As stated earlier, *de novo* review requires the trial court to look at the case anew, taking into consideration all of the evidence, and to sit as a fact finder, resolving the conflicts between the evidence. Here, the trial court's order indicates that "[t]he agency did not act upon or through any unlawful procedure nor any error of law." Furthermore, the court did not find any violations of the petitioner's constitutional or statutory rights. Therefore, we conclude that the trial court did perform a *de novo* review as was required, and having done so, properly found no errors of law.

It is also apparent from the order that the trial court performed a whole record review, finding that after "carefully reviewing all the evidence and matters of record" in this case, the final decision of the agency was "supported by substantial evidence" and that it was "not arbitrary or capricious."

In a whole record review, the reviewing court does not substitute its judgment for that of the agency's, but instead examines all competent evidence, including contradictory evidence, and makes a determination as to whether there was substantial evidence to support the agency's decision. *McCrary*, 112 N.C. App. at 167-68, 435 S.E.2d at 364. " 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and is more than a scintilla or a permissible inference.' " *Id.* at 168, 435 S.E.2d at 364 (citing *Wiggins v.*

N.C. Dep't of Human Res., 105 N.C. App. 302, 306, 411 S.E.2d 3, 5 (1992)). If there was substantial evidence, then the court must affirm the agency's decision. *Id.* at 168, 435 S.E.2d at 365. Here, the record fully supported the trial court's order that the evidence was "sufficient to demonstrate willful deliberate unprofessional conduct intentionally engaged in by the petitioner for the purpose of intimidating colleagues, squelching academic discourse and interfering with the administration of the Department's teaching, research and service mission," including instances where petitioner was insubordinate, verbally abusive, and physically violent. We agree with the trial court that this evidence met the requirements of substantial evidence.

We conclude that the trial court both applied the correct standards of review, and that it applied them correctly. The judgment of the trial court is affirmed.

Affirmed.

Judges WALKER and HUNTER concur.

Report per Rule 30(e).

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, EASTERN DIVISION DATED AND FILED OCTOBER 11, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION

NO. 4:99-CV-62-H(3)

DR. SALVATORE DeMARCO,

Plaintiff,

v.

UNIVERSITY OF NORTH CAROLINA, through its Board of Governors, EAST CAROLINA UNIVERSITY DEPARTMENT OF COMMUNICATIONS, SCIENCE AND DISORDERS, CHANCELLOR RICHARD R. EAKINS, VICE CHANCELLOR JAMES HALLOCK, and DR. MICHAEL RASTATTER,

Defendants.

ORDER

This matter is before the court pursuant to defendant's October 22, 1999, motion to dismiss. On February 25, 2000, the court entered an order granting defendants' motion to dismiss. On March 3, 2000, the court stayed the February 25, 2000, ruling to allow the plaintiff to respond to defendants' supplemental brief in support of its motion to

dismiss. Plaintiff did in fact file his response on February 25, 2000, well within the allotted time. Therefore, this matter is ripe for adjudication.

The court has now carefully and duly considered plaintiffs' brief in opposition to defendant's supplemental brief in support of defendant's motion to dismiss filed on February 25, 2000. After careful consideration the court affirms its February 25, 2000, order, based on the reasons stated in that order.

Therefore, defendant's motion to dismiss is GRANTED. The clerk is directed to close this case.

This 11th day of October, 2000.

s/ Malcolm J. Howard
MALCOLM J. HOWARD
United States District Judge

At Greenville, NC
#7

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, EASTERN DIVISION DATED AND FILED MARCH 2, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION

NO. 4:99-CV-62-H(3)

DR. SALVATORE DeMARCO,

Plaintiff,

v.

UNIVERSITY OF NORTH CAROLINA, through its Board of Governors, EAST CAROLINA UNIVERSITY DEPARTMENT OF COMMUNICATIONS, SCIENCE AND DISORDERS, CHANCELLOR RICHARD R. EAKINS, VICE CHANCELLOR JAMES HALLOCK, and DR. MICHAEL RASTATTER,

Defendants.

ORDER

This matter is before the court on its own motion. On February 25, 2000, the court entered an order GRANTING defendants' motion to dismiss. It has since come to the court's attention that plaintiff had requested and received an extension of time to respond to defendants' supplemental brief in support of its motion to dismiss. The extension of

time provided that plaintiff had until February 28, 2000, to respond to the defendants' supplemental brief. Plaintiff did in fact file her response on February 25, 2000, well within the allotted time. Because the court entered the order prior to the deadline for plaintiff to file her response, the court hereby STAYS its February 25, 2000, ruling until the court has an opportunity to properly review plaintiff's response brief.

This 2nd day of March, 2000.

s/ Malcolm J. Howard
MALCOLM J. HOWARD
United States District Judge

At Greenville, NC
#8

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, EASTERN DIVISION DATED FEBRUARY 24, 2000 AND FILED FEBRUARY 25, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION

NO. 4:99-CV-62-H(3)

DR. SALVATORE DeMARCO,

Plaintiff,

v.

UNIVERSITY OF NORTH CAROLINA, through its Board of Governors, EAST CAROLINA UNIVERSITY DEPARTMENT OF COMMUNICATIONS, SCIENCE AND DISORDERS, CHANCELLOR RICHARD R. EAKINS, VICE CHANCELLOR JAMES HALLOCK, and DR. MICHAEL RASTATTER,

Defendants.

ORDER

This matter is before the court on defendants' motion to dismiss filed on July 12, 1999. Plaintiff responded in opposition on August 20, 1999. The defendants replied on August 31, 1999; therefore, this matter is ripe for adjudication.

Appendix E

STATEMENT OF THE CASE

This action arises from the termination of plaintiff, Salvatore DeMarco's ("DeMarco"), employment with East Carolina University. Prior to his termination, DeMarco worked in the Department of Communication Sciences and Disorders from 1981 until 1997. DeMarco alleges that he became a tenured professor in 1990 and held that position until his separation in 1997.

In or around September 1995, DeMarco was diagnosed with Multiple Sclerosis ("MS"). He alleges that the defendants were given written notice of his condition on March 27, 1996. DeMarco also alleges that defendants regarded him as disabled, were insensitive and discriminated against him because he had MS. On February 28, 1997, DeMarco received a letter informing him that Chancellor Richard R. Eakin ("Chancellor Eakin") intended to take disciplinary action against him for various employment related infractions.

The record shows that on April 28, 1997, Chancellor Eakin sent DeMarco a letter that read as follows, "this letter formally notifies you of [my] intent to discharge you from your employment as a tenured professor." (*See* Defs.' Ex. B attached to Eakin Aff.) The letter went on to inform DeMarco of his due process rights, including the right to request specific reasons for the discharge and the right to request a due process hearing. Furthermore, the letter informed the plaintiff that he was suspended effective immediately. *Id.* As of right, DeMarco requested specification of the reasons for discharge and of due process hearing. Chancellor Eakin provided specific reasons for the termination in a letter dated May 8,

1997, and due process hearings were held beginning in June 1997. For various reasons, the due process hearings were not completed until the spring of 1998. The due process committee disagreed with Chancellor Eakin's decision and held that DeMarco should not be discharged. However, Eakin disagreed with the decision reached by the committee and decided to affirm his prior decision to terminate DeMarco. Accordingly, on April 15, 1998, Eakin sent DeMarco a letter stating, "I have decided that the Committee's decision must be disapproved and that you must be discharged from your employment as a tenured member of the faculty effective immediately." (*See* Defs.' Ex. F attached to Eakin Aff.) The letter also informed DeMarco that he had the right to appeal Eakin's decision to the Board of Trustees. *Id.*

On appeal, the Board of Trustees affirmed Chancellor Eakin's decision. Next, Demarco appealed to the North Carolina Board of Governors. The Board of Governors are the final step in the administrative review process for a tenured professor like DeMarco. The Board of Governors fully heard DeMarco's claim and like the Board of Trustees, affirmed the decision to discharge DeMarco. On October 9, 1998, after exhausting all avenues of administrative review, DeMarco filed a petition for judicial review of the final administrative decision in Wake County Superior Court.

With the state court decision pending, DeMarco filed a federal complaint against the defendants on May 14, 1999. The complaint set forth claims virtually identical to those pending before the state court. The complaint alleges violations of Title I of the Americans with Disabilities Act; violations of DeMarco's constitutional right to free speech

and due process; breach of contract; wrongful discharge; negligent and intentional infliction of emotional distress; and, violations of the North Carolina constitution.

On December 29, 1999, prior to any ruling by this court, Superior Court Judge Donald W. Stephen issued a final order in the parallel state case. After a careful review of all the evidence and matters of record, Judge Stephens addressed the same claims that are pending before this court and found that "[t]he whole record demonstrates no violation of any constitutional or statutory right of [DeMarco]." Accordingly, Judge Stephens once again affirmed the decision to discharge DeMarco. Defendants now contend that the present action is barred by the doctrine of claim preclusion, or *res judicata*, because the identical claim was resolved by a final judgment on the merits in state court.

COURT'S DISCUSSION

I. Standard of Review

In reviewing a motion to dismiss, the court should view the allegations of the complaint in the light most favorable to the plaintiff. *See De Sole v. United States of America*, 947 F.2d 1169 (4th Cir. 1991). The court must recognize the factual allegations of the complaint, but is not bound with regard to its legal conclusions. *See District 28 United Mine Workers, Inc., et al. v. Wellmore Coal Corp., et al.*, 609 F.2d 1083, 1085 (4th Cir. 1979). Plaintiffs are entitled to reasonable inferences by the court in ruling on a motion to dismiss. *See Mylan Labs, Inc. v. Akzo N.V.*, 2 F.3d 56 (4th Cir. 1993). Motions to dismiss are granted only where the

plaintiff can prove no set of facts which would entitle him to relief. *See Mylan Labs, Inc. v. Matkari*, 7 F.3d 1130 (4th Cir. 1993).

II. *Res Judicata*

The doctrine of claim preclusion, or *res judicata*, bars a subsequent lawsuit when there exists (1) a final judgment on the merits in an earlier suit, (2) an identity of the cause of action in the first and second suits, and (3) an identity of parties or their privies in the two suits. *See Keith v. Aldridge*, 900 F.2d 736, 739 (4th Cir. 1990). As DeMarco's state case was resolved by a final judgment on the merits, *See In the Matter of Salvatore DeMarco v. East Carolina University*, 98-CVS-11775 (Wake Co. Superior Ct. December 29, 1999), and the parties are identical in both actions, the critical element in resolving this dispute centers around the identity of the causes of action in the state and federal suits.

In analyzing the identity of the causes of action, "it is the substance of the actions that must be compared and not their form." *Astron Industrial Associates Inc. v. Chrysler Motors Corp.*, 405 F.2d 958, 961 (5th Cir. 1968). In this case, the court finds that the substance of the state and federal causes of action are identical. The state and federal causes of action arose from the same set of facts, namely DeMarco's discharge. Both suits contest whether his discharge violated his due process rights. Both suits contest whether the discharge occurred as a result of disability discrimination. Both suits contest whether the decision to discharge him was made in an arbitrary and capricious manner. The court cannot find a single factor that distinguishes the state suit from the federal

suit. Accordingly, all of DeMarco's claims are barred by the doctrine of *res judicata*. Defendants' motion to dismiss is GRANTED.

CONCLUSION

For the reasons stated above, the court GRANTS defendants' motion to dismiss as to all of plaintiff's claims. The clerk is directed to close this case.

This 24th day of February, 2000.

s/ Malcolm J. Howard
MALCOLM J. HOWARD
United States District Judge

At Greenville, NC
#8

APPENDIX F — ORDER OF THE GENERAL COURT OF JUSTICE, SUPERIOR COURT DIVISION, STATE OF NORTH CAROLINA, COUNTY OF WAKE DATED DECEMBER 23, 1999 AND FILED DECEMBER 29, 1999

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
STATE OF NORTH CAROLINA
COUNTY OF WAKE

98-CVS-11775

IN THE MATTER OF SALVATORE DEMARCO,

Petitioner,

v.

EAST CAROLINA UNIVERSITY,

Respondent.

ORDER

THIS MATTER is before the Court for judicial review under G.S. 150B, Article 4, of a final agency decision to discharge the Petitioner, Salvatore Demarco, tenured professor at East Carolina University. The stated basis for such discharge was deliberate unprofessional misconduct, which rendered Petitioner unfit to continue as a faculty member at that institution.

The Court has completed a full review of the whole record which discloses that after several years of acrimonious

activity within the Department of Communication Sciences and Disorders between the Petitioner and other faculty members, the Department Head, on February 25, 1997, requested that an investigation and hearing be conducted for the purpose of dismissal of the Petitioner from his faculty position at that university. The grounds for such request were the Petitioner's alleged acts of intentional and unprofessional misconduct.

Based upon this request, Chancellor Richard Eakin conducted an investigation and, by letters dated April 28, 1997 and May 8, 1997, gave Petitioner notice of intent to dismiss him from the faculty for misconduct. The four specific allegations were: (1) obscenity during a faculty meeting; (2) ridiculing and pushing a fellow faculty member during a faculty meeting; (3) refusal to perform a client evaluation in the Department's clinic; and (4) deliberately engaging in unprofessional conduct with the intent to intimidate colleagues, squelch academic discourse and interfere with the administration of the Department.

Petitioner immediately requested a hearing before the faculty Due Process Committee, a standing committee of tenured faculty. That committee began hearing evidence in June of 1997 and finally closed the presentations on February 20, 1998. The committee heard approximately 14 days of evidence, which can be found in the first five notebooks constituting part of the record in this case.

Based upon such evidence, the committee issued a report dated March 6, 1998 wherein they found that the acts alleged in specifications one through three did not constitute

misconduct and that the Petitioner did not *deliberately* engage in unprofessional conduct. They also found that the Department's productivity was not impaired or its function decreased by Petitioner's conduct. The committee recommended re-instatement.

East Carolina University Chancellor Richard Eakin thereafter independently reviewed and evaluated the same evidence presented at the Due Process Hearing, disapproved the committee recommendation and, by written decision dated April 15, 1998, discharged the Petitioner.

Petitioner appealed his dismissal to the East Carolina Board of Trustees and to the UNC Board of Governors. The ECU Board affirmed and concurred in their Chancellor's decision to discharge Petitioner. The UNC Board of Governors left that decision undisturbed.

The Court has carefully reviewed all the evidence and matters of record in this case. The evidence which the Chancellor found to be accurate, true and credible was substantial admissible evidence which was sufficient to constitute misconduct and was sufficient to demonstrate willful deliberate unprofessional conduct intentionally engaged in by the Petitioner for the purpose of intimidating colleagues, squelching academic discourse and interfering with the administration of the Department's teaching, research and service mission.

The whole record demonstrates no violation of any constitutional or statutory right of the Petitioner. This governmental agency did not act in excess of its statutory

authority or outside or beyond its jurisdiction. The agency did not act upon or through any unlawful procedure nor any error of law. The final decision is supported by substantial admissible evidence in view of the entire record as submitted. The final agency decision is not arbitrary or capricious. No substantial right of the Petitioner has been violated.

WHEREFORE, the final agency decision to discharge the Petitioner is affirmed. This Petition is dismissed with prejudice.

So ordered this the 23rd day of December, 1999.

s/ Donald W. Stephens
DONALD W. STEPHENS
SUPERIOR COURT JUDGE
PRESIDING

APPENDIX G — REPORT OF THE COMMITTEE ON PERSONNEL AND TENURE DATED SEPTEMBER 11, 1998

[Omitted here but submitted separately as Lodging]

APPENDIX H — DECISION OF RICHARD R. EAKIN, CHANCELLOR, EAST CAROLINA UNIVERSITY DATED APRIL 15, 1998

[Omitted here but submitted separately as Lodging]

APPENDIX I — REPORT OF THE DUE PROCESS COMMITTEE, EAST CAROLINA UNIVERSITY DATED MARCH 6, 1998

[Omitted here but submitted separately as Lodging]

APPENDIX J — STATUTE INVOLVED

28 U.S.C. § 1738

The Acts of legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possession by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.